Paul Neal Cooley, Esq.
BJORNSON LAW OFFICES, P.C.
2809 Great Northern Loop, Suite 100
Missoula, MT 59808
Telephone: (406) 721-8896
Facsimile: (406) 541-8900
Email: paulc@bjornsonlaw.com

Attorneys for Defendants/Appellants

IN THE SUPREME COURT OF THE STATE OF MONTANA

Cause No.

JOHN FITZGERALD,

Defendants and Appellants,

-v-

MISSOULA COUNTY JUSTICE COURT
OF MISSOULA COUNTY, MONTANA,
DEPT. #2, HON. KAREN A. ORZECH,

Plaintiffs and Appellees,

PETITION FOR WRIT OF MANDAMUS, WRIT OF PROHIBITION AND/OR WRIT OF SUPERVISORY CONTROL

COMES NOW John Fitzgerald (Fitzgerald) and petitions the Montana Supreme Court to enter a Writ of Mandamus ordering her to deny the filing of the amended complaint , Writ of Prohibition ordering her to not conduct a trial , and/or Writ of Supervisory Control to the Justice Court of Missoula County, Honorable

Justice Karen Orzech presiding, pursuant to M. R. App. P. 14.

STATEMENT OF RELEVANT FACTS AND PROCEEDINGS IN THE JUSTICE COURT OF MISSOULA COUNTY, HON. JUDGE ORZECH PRESIDING

On or about May 25, 2009, Fitzgerald appeared and pled not guilty to a second offense charge of driving under the influence (DUI) and driving without headlights in Missoula Justice Court, Hon. K. Orzech presiding. After the Omnibus Hearing on July 17, 2009, the State filed an Amended Complaint which was signed by Judge Orzech on August 21, 2009. This Amended Complaint alleged that Fitzgerald was driving a Camaro on Third Street while DUI as a first offense, and while driving without headlights. Trial was set on September 25, 2009.

On the morning of trial, the State moved in chambers to amend the complaint (again) to allege that Fitzgerald was in a white van on the corner of Reserve and Mullan, while DUI, and driving without headlights. All parties now agree that no evidence exists showing Fitzgerald in a Camaro or that he was on Third Street. Fitzgerald objected arguing that the trial-day amendment was one of substance and not of form. Judge Orzech erroneously ruled that the amendment was one of form and granted leave to amend, ordering trial to commence immediately.

Fitzgerald objected and requested a continuance to seek appropriate relief

from the District Court or for time to prepare for trial on new charges. The State conceded the continuance was appropriate because of the late amendment. Judge Orzech begrudgingly granted the continuance and dismissed the jury from service.

Fitzgerald filed for relief in the District Court on October 23, 2009 requesting a Writ ordering the Justice Court to rescind its order allowing the amendment the day of trial. All parties waited to proceed with the case until the motion in the District Court was resolved, and Judge Orzech ordered regular, written status reports while the decision was pending. On May 4, 2010, the District Court found that the amendments were clearly substantive, triggering MCA §46-11-205 (2009), which precludes amendments within five (5) days of trial.

Rather than order the dismissal, the District Court decided the proper remedy was to continue the trial and allow Fitzgerald time to prepare. Even though Fitzgerald's Petition to the District Court was caused by the State's sloppy complaint and the erroneous trial-day amendment, the District Court determined that because Fitzgerald sought the continuance and filed a petition before the District Court, it was impossible for the Justice Court to timely try the case. The District Court imposed no penalty upon the Justice Court for its error. Fitzgerald is charged with the time burden of the State's error together with the Justice Court's failure to deny an untimely amendment.

On May 17, 2010, Fitzgerald filed a Motion to Dismiss for Lack of Speedy Trial in the Justice Court based upon the time limit set forth under MCA § 46-13-401(2) and the speedy trial test set forth in *State v. Ariegwe*, 2007 MT 204, 338 Mont. 442, 167 P.3d 815. This case was delayed some 287 days after the original trial date and **410 days** from the time Fitzgerald was originally pled. It was denied. Jury trial is set for July 9, 2010 and the jury confirmation hearing is July 2, 2010.

STANDARD OF REVIEW

The Supreme Court may review a challenge to a decision by a lower Court based upon a Petition for Extraordinary Relief. *Driver v. Sentence Review Division in the Supreme Court of the State of Mont.*, 2010 MT 43, ¶ 9, 355 Mont. 273, 227 P.3d 1018. The Supreme Court is empowered by Article VII, Sections 2 of the Montana Constitution to issue Remedial Writs. Mont. Const. art. VII, §2.

The issuance of a Writ of Mandamus, Writ of Prohibition, and/or Writ of Supervisory control calls for a conclusion of law which the Supreme Court reviews to determine if it is correct based upon the applicable sections of the Montana Code. *Bostwick Properties, Inc. v. Mont. Dept. of Natural Resources and Conservation*, 2009 MT 181, ¶ 15, 351 Mont. 26, 208, P.3d 868; See also M. R. App. P. 14.

A Writ of Mandamus must be issued to compel the performance of an act that the law specifically enjoins when an official is failing to perform a clear legal

duty and the applicant has no other plain, speedy remedy at law MCA §27-26-102; *State ex rel. Neuhausen v. Nachtsheim*, 253 Mont. 296, 299, 833 P.2d 201, 203 (1992). A Writ of Prohibition is a counterpart Writ and it stops the proceedings of any lower tribunal using the same standard. MCA §27-27-102. The normal remedy for an error at Justice Court is a trial de novo. Here, Fitzgerald argues that he should not bear the burden of any trial because of the error.

This Court acts under M. R. App. P. 14(3) to control the course of litigation where the lower Court is proceeding under a mistake of law and is causing a gross injustice. *Driver*, ¶ 8. The determination of whether supervisory control is appropriate is a case-by-case decision, "based on the presence of extraordinary circumstances and a particular need to prevent an injustice from occurring." *Id.*

ARGUMENT

Fitzgerald is without any plain, speedy remedy at law, and he seeks from this Court a Writ of Mandamus, Writ of Prohibition, and/or Writ of Supervisory Control, or other appropriate relief, ordering the Justice Court to rescind its Order allowing the amendment pursuant to the restrictions set forth under Mont. Code Ann. §46-13-401(2) and/or ordering the delay in the proceedings to be charged to the State and dismissing this case for lack of speedy trial.

I. THE AMENDMENT TO THE COMPLAINT WAS PROHIBITED BY MONTANA LAW WITHIN 5 DAYS OF TRIAL

MCA § 46-11-205 prohibits all substantive amendments within five (5) days

of aTrial and allows amendments as to form only where "the substantial rights of the defendant are not prejudiced." MCA §46-11-205(3). If the amendment is substantive, it is unequivocally prohibited within five (5) days of trial. MCA §46-11-205(1). The Justice Court initially allowed the State's amendment to the Amended Complaint under the guise that it was in form only. This conclusion was incorrect. See District Court Order dated May 4, 2010, attached as Exhibit A.[1]

The proper remedy for the State's error is to deny the amendment, not to force Fitzgerald to move continue the case on the day of trial and then charge the time to Fitzgerald thereby incurring additional attorney's fees and stress and delay. Even if the Justice Court were to accept the State's amendment, it should have forced the State to request the continuance under MCA §46-11-205(2) examining the requested continuance under the required "diligence shown on the part of the movant" something literally impossible given the State's gross error in trial preparation. See MCA §46-13-202(2). Had the Justice Court ruled properly, **it could not have granted a continuance to the State.** Where the State made no motion and the Court failed to order the same *sua sponte*, it is manifestly unjust to gloss over impermissible error and procedure and then charge the consequences to Defendant.

The Justice Court held an Omnibus Hearing on July 17, 2009. The purpose of the required omnibus hearing is to expedite the procedures before trial, MCA

[1] Both Orders from District Judge McLean are attached

§46-13-110(2), and provide "orderly and fair administration of the criminal justice system," *State v. VonBergen*, 2003 MT 265, ¶ 16, 317 Mont. 445, 77 P.3d 537. After the Hearing, the State attempted to amend its complaint twice and substantively change the charges against Fitzgerald on the morning of trial.

THE DEFENDANT WAS DENIED A SPEEDY TRIAL

A criminal defendant's right to a speedy trial is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article II, Section 24 of the Montana Constitution. *Ariegwe*, ¶ 20. Pursuant to MCA §46-13-401(2) and the speedy trial test set forth by this Court in *Ariegwe*, Fitzgerald was denied due process and a speedy trial and this Court should compel immediate dismissal and allow the Justice Court and the State to face due process. Indeed, had the Justice Court done it properly, the matter would have been dismissed the day of trial for lack of evidence. In the alternative, the Justice Court should have properly examined whether continuance should have been granted and charged the time to the State or denied the continuance. Had the continuance been properly sought by the State, the rigid 180 day requirement of MCA § 46-13-401(2) would still control the underlying proceedings.

a. Section 46-13-401(2) Controls

MCA § 46-13-401(2) states that "[a]fter the entry of a plea upon a misdemeanor charge, the court, unless good cause to the contrary is shown, shall

order the prosecution to be dismissed, with prejudice, if a defendant whose trial has not been postponed upon the defendant's motion is not brought to trial within 6 months." The State peripherally argues that this statute does not apply because the Defendant requested the continuance.

In *State v. Knox*, 207 Mont. 537, 675 P.2d, 950 (1984), this Court held that MCA § 46-13-201(2) implemented a specific six-month time period before violation of a defendant's constitutional rights to speedy trial. *Id.* at 539, 675 P.2d at 951. The statute was enacted for the purpose of enforcing a constitutional right and it must be construed fairly for that result. *Id.* at 540, 675 P.2d at 951. The charges against a defendant must be dismissed pursuant to MCA § 46-13-401(2) if (1) the postponement is not attributable to the defendant and (2) the State has not shown good cause for the delay. *City of Helena v. Roan*, 2010 MT 29, ¶ 7, 355 Mont. 172, 226 P.3d 601. The burden is on the State to show the defendant's rights were protected, *Id.* at ¶ 13, and the burden to assure cases are brought timely to trial is also on courts and prosecutors, *State v. Lacey*, 2010 MT 6, ¶ 17, 355 Mont. 31, 224 P.3d 1247.

The postponement here is attributable to the State. Fitzgerald moved to continue because of substantive errors in the State's complaint, but the State argues that the time is attributable to Fitzgerald simply because he requested the continuance due to the Justice Court's error in granting the trial-day amendment.

If this Court accepts the State's argument, it would solicit the State and the court system to violate a defendant's right without consequence. It would provide a win-win system for the prosecution, whereby if it errs, it would invite the Court to err as well, burdening a defendant with the responsibility of asking for time to prepare, or requiring a defendant to go to trial without the benefits of due process. Instead of holding the State to the task of doing it properly, the underlying courts have afforded them illegal leeway and charged Fitzgerald with fixing it. It is unreasonable to shift that burden to the Defendant who is guaranteed due process by our Constitution and disingenuous to shift the burden of due process from the Court and the prosecution…, who are most likely to know the rules.

The delay from the original September 25, 2009 trial and the District Court's May 5, 2010 Order should be charged against the State. This time alone runs well in excess of the six-month requirement. MCA § 46-13-401(2) was enacted to protect the rights of defendants—not to provide an avenue for the State to postpone bringing a defendant to trial when it improperly charges and forces the defendant to move to continue.

The State must also prove good cause to overcome MCA § 46-13-401(2). "The statute itself serves as the sole standard of whether 'good cause' for the delay has been shown." *City of Helena* ¶ 9. Good cause is generally defined as "legally sufficient reason" in the totality of circumstances. *Id.* at ¶ 13. In *State v.*

Bertolino, 2003 MT 266, 317 Mont. 453, 77 P.3d 543, the defendant's lack of response to court orders "did not constitute affirmative procedural delay." ¶¶ 12-16. Nevertheless, the State argued the defendant's "passive disregard" satisfied the good cause exception, but this Court determined that the State should have requested sanctions for the defendant's failure to answer court orders and proceed with trial, and the delay was therefore attributable to the State. *Id.* The onus is on the State to bring the matter properly to trial within the timeframe allotted, and good cause does not exist where the State did not actively and properly bring a defendant to trial.

Here, where the State and Justice Court's errors cause the extension, it is both unjust and unconstitutional to shift the burden of that error to Fitzgerald, who is the beneficiary of the protections afforded by the violated statutes.

b. The Delay in this Case Is Unconstitutional Pursuant to the Speedy trial Test

In *State v. Bullock*, 272 Mont. 361, 901 P.2d 61 (1995), the Montana Supreme Court discussed that the "where a defendant has not requested a delay, the six month standard is the sole consideration for speedy trial analysis." *Id.* at 368, 901 P.2d at 66. However, in *State v. Ronningen*, 213 Mont. 358, 691 P.2d 1348 (1984), this Court held that it would be inclined to apply the speedy trial test used for felonies if the statute for misdemeanors were nonexistent or not more restrictive than the speedy trial test. *Id.* at 362, 691 P.2d at 1350. Accordingly, if

MCA §46-13-401(2) is rendered inapplicable, the Court should similarly apply the speedy trial test.

Montana Courts consider the following factors to determine if the defendant's speedy-trial rights have been violated: (1) the length of the delay; (2) the reasons for the delay; (3) the accused's responses to the delay; and (4) the prejudice caused by the delay to the accused. *State v. Billman*, 2008 MT 326, ¶ 11, 346 Mont. 118, 194 P.3d 58 (summarizing the test set forth in *Ariegwe*). No single factor is dispositive, and "the factors must be considered together with such other circumstances as may be relevant." *Ariegwe*, ¶ 102. Courts must keep in mind that "the right to a speedy trial is a fundamental right of the accused, [and] this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution." *Id.* at ¶ 153.

i. Factor One: The Length of the Delay

The court determines the length of the delay between accusation and date of trial or final disposition of the case. *Ariegwe*, ¶¶ 43, 107. The threshold for an unconstitutional delay for felony charges is 200 days after accusation. *State v. Hendershot*, 2009 MT 292, ¶ 10, 351 Mont. 271, 216 P.3d 754. For a misdemeanor charge, the threshold is six months pursuant to MCA §46-13-401(2). *Ariegwe,* ¶ 41, n. 2; See also *State v. Jenkins*, 262 Mont. 117, 120, 863 P.2d 438, 440 (1993). This threshold is irrespective of fault for delay. *Ariegwe*, ¶ 107. The

length of the delay is significant because it intensifies the presumption of prejudice. *Ariegwe*, ¶ 107. Additionally, the further the delay stretches beyond the threshold, the more compelling the state's justification must be for it. *Id.*

The delay here is 410 days from May 25, 2009 to the current trial date of July 9, 2010, making the delay *after* the six-month threshold on November 25, 2009, approximately 226 days. This delay is substantial and the State's burden to prove that Fitzgerald was *not* prejudiced is heightened, and Fitzgerald's burden to prove that he was prejudiced is diminished. See *State v. Hardaway*, 2009 MT 249, ¶ 9, 351 Mont. 488, 213 P.3d 776 (where there was a delay of 232 days beyond the threshold increased the State's burden).

ii. Factor Two: The Reasons for the Delay

The Court must attribute each period of the delay to the appropriate party. *State v. Lacey*, 2010 MT 6, ¶ 15, 355 Mont. 31, 224 P.3d 1247. The Court focuses on the primary area of contention between the parties. *Id.* The burden to assure that cases are brought to trial is on the courts and the prosecutors. *Ariegwe*, ¶ 72. When weighing the delay, institutional delays weigh less heavily than intentional delay against the state, *Ariegwe*, ¶ 68, but all delays are charged to the state unless the accused caused the delay or waived his rights, *Id.* at ¶ 108; *Billman*, ¶ 20.

In *State v. Hardaway*, the defendant (Hardaway) filed a motion to suppress evidence because the State had not disclosed the identity of a confidential

informant (CI). *Id.* at ¶ 4. Hardaway requested a continuance to file a brief in support of his motion to suppress. *Id.* The District Court gave Hardaway until 10 days after the state provided the name of the CI to file his brief. *Id.* Two months later, after realizing that the trial had not been rescheduled (the State had yet to disclose CI's identity), the court *sua sponte* reset the trial date. *Id.* at ¶ 5. Later, the State moved to endorse an additional witness as an expert, and Hardaway moved to continue trial again for rebuttal. *Id.* at ¶ 6.

The Court determined that delays caused by the State's failure to disclose the identity of the CI should be attributed to the State, despite numerous continuances requested by the defendant (one even caused by attorney unavailability). *Id.* at ¶ 20. The Court determined that the request for continuance was reasonable because Hardaway had the right to know the CI's identity. *Id.* It was the State's failure to timely identify the CI that caused a lengthy delay in the proceeding, *not* Hardaway's continuance, and the Court weighed this delay heavily against the State. *Id.* at ¶ 21. Additionally, the Court charged delays associated with the State's late identification of an expert witness to the State, despite Hardaway's continuance on that ground, *Id.* at ¶ 22, and this time was also weighed heavily against the State. *Id.* at ¶ 23.

Similarly, it was the State's failure to accurately plead and the Justice Court's failure to accurately deny the amendment that caused the lengthy delay for

Fitzgerald in this case. The time to correct the State's error should be weighed heavily against the State. After the six-month threshold, the State needs an increasingly valid justification for the delay. All delays are charged to the State in defense of a defendant's constitutional rights so long as the defendant did not waive those rights or cause the delay. The State has not met its heightened burden here to justify its delay for so many months after the six-month threshold.

iii. Factor Three: The Accused's Responses to the Delay

The Court must evaluate the accused's responses to the delay because they are "indicative of whether he or she actually wanted a speedy trial, which in turn informs the inquiry into whether there has been a deprivation of the right." *Ariegwe*, ¶ 110. The totality of the accused's responses to the delays are balanced with the other factors of the speedy trial test, *Lacey*, ¶ 22, but this factor is afforded the least weight for speedy trial purposes. *Ariegwe*, ¶ 142.

Fitzgerald was reasonable in waiting for a response from the District Court before proceeding in the Justice Court because it has been shown that the Justice Court was intent on pursuing its erroneous approach, and, as soon as he received the decision from the District Court, he promptly filed a Motion to Dismiss in the Justice Court for lack of a speedy trial. Fitzgerald only requested continuances to correct error by the State and Court.

iv. Factor Four: The Prejudice Caused by the Delay to the Accused

In analyzing whether the accused has been prejudiced by the delay, courts address the interests that a speedy trial right is designed to protect—namely: (1) preventing oppressive pretrial incarceration; (2) minimizing anxiety and concern caused by unresolved criminal charges; and (3) limiting the impairment of the accused's ability to present an effective defense. *Ariegwe*, ¶ 111. Where the length of the delay is great, the accused's burden of presenting affirmative evidence of prejudice is lessened. *Hardaway*, ¶ 26. Each day the delay continues "triggers an intensifying presumption of prejudice" that can "tips the scales" in a defendant's favor, and "in the absence of affirmative proof of impairment, [the Court] focus[es] on the other speedy trial factors to assess whether the pretrial delay has prejudiced the accused's defense." *Hardaway*, ¶¶ 26-30 (internal citations omitted).

The presumption here is that Fitzgerald has been prejudiced by the delays. While Fitzgerald has not been incarcerated during the pendency of this case, the delays have clearly caused anxiety, large accumulating attorney's fees in defense of his rights and, now over a year after his accusation, have impaired Fitzgerald's ability to present an effective defense. Because the delay stretches 410 days after accusation, prejudice is presumed and continues to intensify.

CONCLUSION

Fitzgerald is scheduled for a trial on July 9, 2010, in violation of his constitutional protections and the Montana statutes against trial day amendments of substance and his right to a speedy trial. Fitzgerald requests this Court intercede and uphold his rights—there is no other plain, speedy remedy at law. Using either the misdemeanor test under MCA § 46-13-401(2) or the speedy trial test set forth by the *Ariegwe* Court, Fitzgerald is entitled to dismissal of this action before trial. Should the Court simply shift the blame of this error and the damage occasioned by it to the entity that caused it—the State—the decision would be swift and clear: Dismissal for Lack of Evidence that Fitzgerald was in a Camaro on Third street. The Constitution, due process, and the available time of busy courts will long be served insuring the Justice Court gets it right.

A defendant who is aggrieved by an error at Justice Court normally has one form of relief—a trial de novo in District Court. This rule, however, is counter-productive where the lower court intentionally err to provide the prosecution a soft landing and impose financial burden on Defendants. Inaction by this Court will imply that this can be done again and that the higher courts are too busy to make sure that Justice Courts follow the rules. It would also deny due process at the most basic and immediate and common level accessible by Montana citizens. A possible majority of the justice handed out in Montana is done in the Justice Court,

where it acts as a first line of defense to a backlogged District Court system. The errors in this case can still be righted and due process upheld without requiring a second trial while sending a message that getting it right in Justice Court is the goal. Issuing an extraordinary writ will reinforce statutes and not authorize a departure from due process to protect the State from its error. Even if after due consideration, this Court upholds the scheduling of a trial, the scheduling of a July 9, 2010 trial should not occur. This Court should order the trial postponed until it rules on this Petition and hears both sides of the request.

DATED this _____ day of June, 2010.

BJORNSON LAW OFFICES, P.C.

_____
Paul Neal Cooley
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of June, 2010, I mailed a copy of the proceeding document, postage prepaid upon the following:

Missoula County Attorney
Missoula County Attorney's Office
200 West Broadway
Missoula, Montana 59802

Missoula County Justice Court
Hon. Karen Orzech presiding
200 West Broadway
Missoula Montana 59802

_____